UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

	Case No.
LEHMAN BROTHERS INC.,	08-01420-jmp SIPA
Debtor.	

- -x

In the Matter of:

	Case No.
LEHMAN BROTHERS HOLDINGS INC.,	08-13555-jmp
Debtor.	

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

May 9, 2011

2:05 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Hearing Re: The Trustee's Memorandum Regarding the Proposed Orders Submitted by the Trustee and Barclays Capital, Inc., The Trustee's Reply Memorandum Regarding the Proposed Orders Submitted by The Trustee and Barclays Capital, Inc., Reply Memorandum Supporting the Positions of Barclays Capital Inc. Relating to the Orders Implementing the Court's February 22, 2011 Decision

Transcribed by: Dena Page

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P R O C E E D I N G S

THE COURT: Before we start the presentation, I'd be interested in knowing whether or not, notwithstanding the fact that I received reply papers as recently as May 4, any progress may have been made since then in narrowing areas of disagreement.

MR. MAGUIRE: Yes, Your Honor. Bill Maguire for the SIPA trustee. We have been able to resolve a couple of issues, Your Honor. One is with respect to what the right number is on the clearance box and the dispute about specific performance versus a damages remedy. There, you may recall, that with respect to the box, Barclays was taking the position it was entitled to specific performance remedy for the undelivered clearance box assets and that that included or would give Barclays the appreciation value of the securities. We disputed that, and we took the position that Barclays was entitled only to the 869 million dollars in damages that it proved at trial. But we also acknowledged that Barclays was entitled to interest at the New York statutory rate of nine percent per annum. And frankly, when one does the math, one gets to a number through very different paths that is, frankly, pretty much the same number. So what the parties have done is we have agreed that the amount of the undelivered clearance box assets can be set in an order that will specify the payment by the trustee to Barclays of 1.1 billion dollars and that there will be no other

payment of any kind. That sets the amount. It obviously reserves the trustee's right to appeal and the ultimate disposition of the box assets, but it sets the amount and makes clear that there's no additional amount by way of distributions or dividends or pre-judgment interest on top of that number. It is a fixed number that both parties have agreed on as being the right number to adjust the ultimate disposition of the undelivered clearance box assets.

THE COURT: So this means that specific performance is now a moot issue?

MR. MAGUIRE: That is correct.

THE COURT: Let me ask you a question about the nine percent pre-judgment interest. There was a dispute as to whether or not the trustee could assert nine percent pre-judgment interest with respect to the trustee's claims. Has that issue been resolved in the context of resolving the issue concerning the clearance box assets?

MR. MAGUIRE: It has not, Your Honor. That's still a matter of dispute between the parties.

THE COURT: It seems that symmetry would dictate that nine percent should apply both ways or that there shouldn't be nine percent, but rather the federal judgment rate interest applicable to both.

MR. MAGUIRE: The parties have not reached agreement on symmetry or anything else other than simply the number with

respect to the clearance box.

THE COURT: I'm not going to get in the way of that agreement, but I see Mr. Boies standing, I presume in reference to my comment on the pre-judgment rate.

MR. BOIES: Exactly, Your Honor, and although I was not a direct participant in these negotiations --

THE COURT: Thanks for fixing that.

MR. BOIES: See how long it lasts.

My understanding was to avoid exactly the question that you're -- the Court raised, that we agreed that the 1.1 million (sic) dollars was in satisfaction of our specific performance claim. Now, if that is not your understanding, then maybe we ought to have a sidebar. But my understanding from the negotiation was that in order to avoid any issue of symmetry or lack of symmetry or any inference of precedent, that we agree that the 1.1 million (sic) dollars --

THE COURT: Billion.

MR. BOIES: -- 1.1 billion dollars, yes, thank you --

THE COURT: I didn't want you to be in trouble with your client, Mr. Boies.

MR. BOIES: I appreciate that because it would have been a lot of trouble. The 1.1 billion dollar amount was in satisfaction of our specific performance claim, which is what we claimed, and that didn't force either of us to reach the issue of damages or interest.

Now, if that is not counsel's understanding, perhaps we ought to have a sidebar.

THE COURT: Well, I think that all that I heard from counsel for the trustee was how the number was derived. I'm not sure that I heard anything that indicated that any rights were being conceded on either side.

However, you did well in this agreement compared to how you would have done with me, so you should feel some level of comfort that you've reached a good number. I would be even happier if there were some symmetry in the agreement because obviously, the number was derived by using some mathematical calculations that included a presumed interest rate.

MR. BOIES: No, Your Honor, that's not so. That's the point I wanted to make. It did not include some kind of mathematical calculation that involved interest rate. It was a settlement of our specific performance claim. We believe the appreciation is significantly above 1.1 billion dollars. We thought we were entitled to specific performance. And we were settling our specific performance claim for 1.1 billion dollars. It had no implication of any interest rate at all from our standpoint, and indeed, I think that that was something that the parties actively talked about in the negotiations. So --

THE COURT: Well, maybe this is one reason why judges rarely want to know what happens in negotiations, because the

more you know, the more likely it is that the deal will unravel.

I accept the settlement at 1.1 billion dollars that has been described, and I'm disregarding the circumstances that give rise to it, including the assertion that you've made that this is a settlement of your specific performance claim. Of course it is; it resolves issues concerning the clearance box assets regardless of the claims being made or the defenses being made on either side. It's just an agreed number.

MR. BOIES: It is an agreed number, Your Honor, but it's an agreed number with respect to a very specific claim.

THE COURT: Yes. It's an agreed number with respect to the clearance box aspect of the decision.

MR. BOIES: Even more specific. We di -- we only -- our claim with respect to that was a claim for specific performance. We did not make a claim for damages; we made a claim only for specific performance.

THE COURT: Well, whether or not that was a claim for specific performance or for the value of the securities as they may have accreted through the application of an interest rate or through other market factors is really irrelevant because you've made a deal which makes it unnecessary for me to address those specifics at an agreed number. If we were to get into the specifics, which I think we're trying to avoid, you might well have lost on the issue of specific performance. So

there's really no point in emphasizing that that's what you just settled. You settled a claim for clearance box assets. It is true that in the history of the case, you were regularly seeking delivery of those assets, but whether or not you had entitlement to delivery of those assets as valued as of the closing or as valued as of the time that you ultimately received delivery is a matter that was never litigated during the trial. This is a matter that came up post-trial. I am happy that you resolved it.

MR. MAGUIRE: Your Honor, Bill Maguire again for the SIPA trustee. There's one other agreement that we've managed to reach, and that's with respect to two of what I'll call are the smaller items of margin, one involving -- and you'll see it in the briefs. It's a reference to 267 million of margin assets which turn out to be partly LBIE customer funds and another number that was simply some confusion between the parties. So those fairly minor aspects of the margin dispute have been resolved.

THE COURT: Is this the 137 million dollar issue?

MR. MAGUIRE: Exactly.

THE COURT: Okay.

MR. MAGUIRE: So those two small numbers have been resolved, and we have, I think, an agreement, almost complete agreement on what the right number is that Barclays should pay the trustee, assuming that the arguments that are raised today

were to be unsuccessful, the arguments by Barclays. The total amount, in other words, of margin that Barclays received, we understand now, is a total -- we calculate it as 2.101 billion dollars. Barclays came up with a number that was eighty million dollars less than that, and we've been informed by Barclays that the reason for the difference is eighty million dollars that was not, in fact, received by Barclays but is in a suspense account at the OCC. We had been going by Barclays' witness, Gary Romain; his notes indicated that Barclays had received 1.375 billion dollars in cash at the OCC. But we understand that it's been clarified that eighty million of that is, in fact, in a suspense account. So we're checking that today, but assuming we confirm that, I think we understand that the total amount of Lehman margin that Barclays has received in connection with this transaction.

THE COURT: And is there a breakdown as to cash and cash equivalents versus government securities within that total number?

MR. MAGUIRE: We understand -- it's actually not within that number because most of the government securities are actually in the possession of the trustee; they were never transferred to Barclays. But we do understand, I think both parties have used the same number to cover that universe of government securities, of margin in the form of government securities as being approximately one and a half billion

dollars.

THE COURT: And of the one and a half billion dollars, are we talking about government securities regardless of maturity?

MR. MAGUIRE: My understanding is that one and a half billion is entirely -- certainly almost entirely made up of government securities with maturities of greater than ninety days.

THE COURT: Okay.

MR. MAGUIRE: There are some T-bills or whatever that are a little bit less that I think are additional to that. So that's my understanding, is that the dispute over government securities is in the ballpark of one and a half billion dollars.

THE COURT: Okay. If I gave you more time, could you reach more agreements?

MR. MAGUIRE: My own sense is we've reached the end of the road --

THE COURT: All right.

MR. MAGUIRE: -- on agreements, Your Honor.

THE COURT: In thinking about how best to deal with this, it seems to me that rather than having one side argue every issue in dispute and having the other side argue every issue in dispute, that we should consider doing this on a dispute-by-dispute basis, thereby focusing in on issues such as

margin and having what amounts to a complete argument in connection with that. Does that make sense to the parties?

MR. BOIES: It does from our respect.

THE COURT: Now, why don't we start with margin, then? It's a big-ticket item and we were just talking about it. And I'm familiar with the issue.

MR. MAGUIRE: If I might approach, Your Honor?

THE COURT: Yes, you may.

MR. MAGUIRE: Again, Bill Maguire for the SIPA trustee.

THE COURT: It's obvious that my suggestion had been anticipated by the parties because this binder is specifically addressed to the margin assets.

MR. MAGUIRE: It takes us time to learn, but we do eventually start to catch on, Your Honor.

Your Honor, we had -- this obviously is, by far, the most significant of the disputed assets. The total amount in dispute was some four billion dollars, and we under -- I mean, that was, frankly, the most significant disputed asset that was tried in the course of the thirty-four day trial. We understood that the Court's opinion in February squarely addressed and resolved that dispute. And we understood from the Court's opinion that the trustee had won on this issue of Lehman's cash and Lehman's cash equivalents and similar cash assets.

Having won, then, we find ourselves now, at this stage, in connection with the entry of the form of order facing this fairly fundamental issue that Barclays is raising in which Barclays is now saying that it's entitled to an offset, which in its papers, it puts in the amount of six billion dollars and then says that Barclays will take only about one billion or a little bit more than one billion dollars by way of offset, still an absolutely staggering number.

There are a lot of problems that we have with this argument. We've characterized it as a new argument, and I want to just be clear what we mean by that. We don't mean that this is just an argument that's arriving too late, that for some procedural misstep, this is something that should really and could have been tried in the course of the case. And when we say it's new, we are objecting to it because this argument is the exact opposite of what Barclays was arguing throughout the trial. Barclays could not have raised this argument during the trial because during the trial, Barclays was making affirmative representations to the Court that totally contradict this argument.

And what we've done in the binder that's before you, Your Honor, in the tab 1, is to put side by side on one sheet of paper the position that Barclays is asserting now with the position that Barclays has asserted up to now. And Barclays' position, in brief, is that under the so-called transfer and

assumption agreement, Barclays took on and assumed this enormous liability, some six billion dollars for the shorts, and that was new consideration. And Barclays is arguing that somehow, that implicit in the Court's opinion, is the voiding of that agreement. And they say that since they gave some six billion dollars of consideration in undertaking that agreement, Barclays is entitled to be compensated for that consideration. And that whole argument is premised on the notion that in entering into the transfer and assumption agreement, Barclays was providing new consideration, and the new consideration was assuming the shorts, the short exchange-traded derivatives. Those liabilities were in the amount of six billion dollars; Barclays says it took those liabilities on under that agreement and that Barclays was not otherwise obliged to take on any of those liabilities.

That is precisely the opposite of what Barclays said up to now. On the left side of the page, we put forward from Barclays' reply brief filed just a couple of weeks ago where -- or last week, actually, where Barclays says in paragraph 79, "Thus the purchase agreement did not require Barclays to assume the short options." Well, that is simply not true, and Barclays itself affirmatively represented to the Court that the purchase agreement did require Barclays to assume the short positions. And on the right side of the page before you, we put forward Barclays' positions both before trial and, indeed,

after trial, all of which uniformly represented to the Court that under the purchase agreement, under the clarification letter, Barclays assumed responsibility for the short positions, the short exchange-traded derivatives. The first is before trial, and that's Barclays' January 2010 opposition brief at paragraph 380 where Barclays says, and I quote, "These purchased assets were specifically defined to include LBI's exchange-traded derivatives." And the sentence goes on and is accompanied by a citation to the clarification letter.

And Barclays goes on to say, "Thus, Barclays acquired not only the ETD, the exchange-traded derivative positions themselves," and it includes, then, a phrase that specifically defines what those exchange-traded derivative positions were, composed of both assets, the long positions, and liabilities, the short positions.

That is completely consistent with Barclays' position after trial. After trial, and we put forward here an excerpt from Barclays' November 2010 post-trial brief at paragraph 88, and there, it's a lengthy quotation, but it starts describing the clarification letter and how it actually narrows and provides more precision to the definition of purchased assets. And it goes on to say that no other short positions are being assumed with respect to the trading inventory Barclays is acquiring "except for the ETDs, where Barclays is acquiring both long and short positions". And then we have a

parenthetical that further confirms that this is both assets and liabilities.

So the new argument that Barclays did not acquire, was not already obliged under the purchase agreement to take responsibility for the shorts is a 180 degree reversal of the representations that Barclays made before trial and after trial. And that, of course, is entirely consistent with the testimony that the Court heard here. You may remember witness after witness was shown the financial schedule in which there were -- this is under the asset purchase agreement in which there were assets on one side and liabilities on the other, and as those assets changed during the week, ultimately, many of the shorts went away. But the shorts that remained included the exchange-traded derivative shorts, and that's where Barclays confirmed before trial and after trial that it retained -- it assumed liability for those shorts, the exchange-traded derivative shorts.

So now, what we have is Barclays asking for an offset for assuming short liabilities to the OCC which Barclays was already required to assume under the purchase agreement. Barclays is saying it should get a credit for giving consideration in taking those shorts on when it entered into the transfer and assumption agreement. The problem with that is that Barclays was already obligated to assume those shorts, whether it entered into the transfer and assumption agreement

or not.

Barclays has a similar argument under Section 550 of the Code. That's exact replay of the same argument, except this time defining this consideration as a cost. Now again, I think it's a fairly clear principle of law. When someone is already obliged to do something, when you're already legally required to assume those liabilities, you can't claim that there's some additional cost in assuming those liabilities. You can't claim that there's some additional consideration that you're providing in undertaking to do what you're already required to do. And Barclays, by its own admissions, was clearly already required to assume these short positions.

I think there are many other subsidiary points that one could make with respect to this new argument, but I think that really is the heart of the issue, Your Honor.

THE COURT: And so your fundamental argument is that having agreed to the number with Barclays, which is approximately 2.1 billion dollars, that that is the amount that the trustee should be receiving back --

MR. MAGUIRE: Exactly.

THE COURT: -- without offset.

MR. MAGUIRE: Without any offset.

THE COURT: Right. That's the position.

MR. MAGUIRE: And exclusive of any prejudgment interest.

THE COURT: And exclusive of any prejudgment interest which you would assert should run at the same nine percent rate -- and I don't mean to restart the dispute -- but at the same nine percent rate which, at least for your internal purposes, you used to derive the 1.1 billion dollar number that we talked about earlier in reference to the clearance box asset agreement.

MR. MAGUIRE: Exactly, Your Honor.

THE COURT: Okay. I understand.

Mr. Boies?

MR. BOIES: Yes, and may I approach with a book of our own, Your Honor?

THE COURT: Yes, of course.

Thank you.

MR. BOIES: Just in terms of a presentation, I was going to start by addressing the government securities issue that the Court raised, and then get to the argument that he just made, but I'm happy to go in reverse order, if that would be easier for the Court.

THE COURT: Well, since Mr. Maguire has not yet made his argument with respect to the government securities, I don't really care who goes first on the argument.

Do you care, Mr. Maguire?

MR. MAGUIRE: I don't, Your Honor.

THE COURT: Fine. So you'll get cleanup on that

issue.

MR. BOIES: Okay. So let me begin with the government securities issue, and in that connection, I would like to begin with tab 6. And the reason I do is because what we are trying to do today is not argue to the Court what we think is right. We're trying to argue to the Court what we think is a natural extension or application of the Court's order. And as we read the Court's order on margin, it was -- the Court said over and over again that there was no Lehman cash going to Barclays. And if that is correct, then the issue becomes what is cash and cash equivalents? And we recognize that cash equivalents should be treated as cash under the Court's opinion.

What we are arguing about is what constitutes cash equivalents. Our view is that cash equivalents are government securities of ninety days in duration or less, not government securities of unlimited duration. The order that the trustee has given the Court would provide that government securities of fifteen, eighteen, nineteen years' maturities would be considered cash or cash equivalents. We think there is simply no support in the record and no support outside the record, as far as that's concerned, for an interpretation of cash and cash equivalents of that nature.

If you would turn to tab 10, you'll see a reference to the fact that it is first undisputed that in their annual reports at the time of the sale, both Barclays and Lehman

defined cash equivalents as securities with a maturity of three months or less. By contrast, as is indicated here, many of the margin assets at issue consisted of government securities with maturities greater than three months. Indeed, many of the securities consisted of government securities with maturities of over fifteen years. Maturities longer than fifteen years, for example, BCI Exhibit 686, is a Treasury bond of about 120 million dollars with a sixteen-year maturity. BCI Exhibit 689 is a Treasury bond of over eighty-six million dollars with a sixteen-year maturity. BCI Exhibit 691 is a Treasury bond of 175 million dollars with a sixteen-year maturity. BCI 687 is a security bond of approximately sixty million dollars with a nineteen-year maturity. All of these government securities and all the ones like them would, under the government's proposed order, be treated as cash and cash equivalents. And we don't think that that is consistent with Your Honor's opinion, and we don't think that such a position could be possibly justified based on the trial record. So what we would argue first --

THE COURT: Well, wait a minute. Wait a minute, Mr. Boies.

MR. BOIES: Yes.

THE COURT: And I realize that you're focused on the definition of cash equivalents as that term is tied into the duration of a government security. But I think you're misreading the opinion as a whole as it relates to the

disposition of the disputed margin because while it is true -- and you emphasized these points -- that the opinion references Lehman cash as an important factor in the decision, it's also true that this entire issue relating to government securities did not come up during the trial, at least I can't remember that it came up during the trial in reference to Barclays' defense to the request by the trustee for a turnover of disputed margin.

Additionally, the opinion itself isn't limited to cash but rather finds, based upon an interpretation of the record relating to the negotiation, drafting and execution of the clarification letter itself, that there was no meeting of the minds in reference to including margin within the clarification letter.

So it would be fully consistent with the opinion I wrote for an order to be entered that delivers all 2.1 billion dollars from Barclays to the trustee quite apart from any arguments relating to what cash and cash equivalents may mean as tied to the duration of government securities.

MR. BOIES: The only thing I would say, Your Honor, is that obviously, it's your opinion and your order and you will write it as you see fit. But I would suggest that if you go beyond the no cash rationale, there simply is no support in the record for -- even if you ignore the meeting of the minds, even if you ignore the clear language of the agreement, which, as

the Court knows was filed with the Court, incorporated -- it's in the Court's -- by -- referenced in the Court's sale order, even if you ignore all that, there is still nothing in the record that would justify giving them all of this margin. I mean, you get there -- they get there -- not the Court, but the trustee gets there, for example, by simply excising words from the sections of the agreement that they quote, like Section 1(b). They leave out the language that says, "except to the extent otherwise specified herein or in the agreement". If you look --

THE COURT: Well, we're not going to relitigate --

MR. BOIES: No.

THE COURT: -- what we spent so much time litigating last year.

MR. BOIES: Not at all.

THE COURT: And I remember vividly Mr. Rosen's testimony on examination and cross-examination and the circumstances that surrounded his parenthetical. I am mindful of at least my recollection of the record. And I'm also mindful of what I wrote. And what surprised me -- and I'll say this, actually, to both sides -- what surprised me when I saw the briefs that were submitted on April 28 and again on May 4 as a follow-up to our informal chambers conference in which we talked about the dispute surrounding the orders to be entered in reference to the February 22 opinion, I really did not have

sufficient foreshadowing of the kinds of disputes that were going to be raised in connection with the form of order to be entered. And it appears to me -- and I don't mean to be suggesting that this amounts to a motion for reconsideration by either party -- but it appears to me that much of what is being argued in the context of the form of order is a motion for reconsideration, and that the issues surrounding margin do not really tie to the duration of government securities. It seems to be a completely new argument by Barclays, one that was not supported at all during the lengthy trial that we had. At no time can I recall any argument made during trial that suggested that the margin issue was in any way tied to the duration of government securities. This is the first that I'm hearing it.

MR. BOIES: Your Honor, the record at trial is, of course, the record at trial, and I don't mean to argue with the Court about the Court's recollection of it. But my recollection of it, right or wrong, is that the fight over these assets was, as I think someone could read the Court's opinion as saying, was a fight over cash, Lehman's cash.

THE COURT: Well, that was only one part of it, Mr. Boies. That was the part that made it very crystal clear to me, because the trustee was always talking, as I heard it, about cash and cash equivalents, and that was something that I heard repeatedly.

MR. BOIES: Yes.

THE COURT: But Barclays was never talking about noncash margin; it never came up.

MR. BOIES: But Your Honor, that's because we were saying that we got them both. We were saying we got them both.

THE COURT: Yes, but you're not entitled to government securities, Mr. Boies. They're excluded. You may have gotten the business that included the trading of government securities, but you didn't get the securities themselves.

MR. BOIES: But Your Honor -- that's from Section 1(b), right? That's what you're talking about? Section 1(b)?

THE COURT: I'm talking about the clarification letter --

MR. BOIES: Yes.

THE COURT: -- and the purchase agreement.

MR. BOIES: Right.

THE COURT: But I don't want to argue with you about this.

MR. BOIES: But all --

THE COURT: Your issue is whether or not the form of order proposed by the trustee is or is not consistent with my opinion.

MR. BOIES: Right.

THE COURT: And I'm letting you know, I believe it is.

MR. BOIES: Okay, and if you don't want me to talk anymore about it, I'll stop talking about it.

THE COURT: No, I'm anxious to hear everything you have to say.

MR. BOIES: Okay, one of the things I want to say is I don't think it is consistent with Your Honor's opinion, all right, because I do not think that Your Honor lays out in your opinion a basis for giving them the margin other than cash and cash equivalents. As the Court says, that's what they argued at trial. All right? And that was the -- and that's what is in the Court's opinion. And I don't think the Court's opinion lays out a basis for giving them the margin other than cash and cash equivalents. And we've asked them to point to the sections; they point, for example -- the reason I mention 1(b) is they point to Section 1(b) and Section 1(b) does talk about the business and whether they include government securities and the extent to which they do, and then goes on to say, though, it says, "except to the extent otherwise specified herein or in the agreement". And Your Honor referenced that exact section in the Court's opinion. And as you -- and I would have interpreted the Court's opinion as being something that gave them the argument they were making at trial, which is that cash and cash equivalents were excluded.

If the Court intends to make a decision beyond that, that's the Court's decision. And I'm really not -- I'm really not trying to argue the underlying merits.

THE COURT: Well, even your papers, Mr. Boies,

acknowledge that the decision can be read to go beyond cash and cash equivalents. You at least gave me that in your papers.

MR. BOIES: Absolutely, Your Honor.

THE COURT: But you're not giving it to me now.

MR. BOIES: Well, Your Honor, what I'm -- I believe that there are references in the Court's opinion. I don't think it's the Court's reasoning, but if the Court says it is the reasoning, obviously, I yield.

THE COURT: Multiple grounds for finding against you on this point.

MR. BOIES: Okay, but the only thing I would say to the Court, okay, is that I would just ask the Court -- I won't argue it anymore -- I would just ask the Court to look at those multiple bases because when you had a -- and maybe we can -- maybe we can't agree, but maybe we could agree that the primary thing that the Court talks about is the cash and cash equivalents. And sometimes when you have multiple bases, the Court has not looked with the same exacting scrutiny at the support or lack of support for some of the alternative bases, and the only thing I would ask the Court to do is that if you are going to hold that they are entitled to all of the government securities that were margin, that the Court look at -- take a hard look and see whether there is a basis for that alternative finding. And with that, I'll move on, unless the Court has a question.

THE COURT: That's fine. But is there no -- let me just be clear on this. There's no dispute with respect to the calculation of the margin. Is that correct?

MR. BOIES: There is, I think, only the -- I think they will ultimately agree with us on the 80 million dollars, and as I understand it, it was the difference between 2.021 billion and 2.101 billion, the difference being 80 million dollars. And if the Court rejected the argument I just made and all the other arguments that I have on this issue, then the only, I think, dispute on this aspect would be that eighty million dollars.

THE COURT: Okay, and then as to the 1.5 billion which is in government securities, of that 1.5 billion, what percentage constitute long-term government securities of the sort that you identified in your argument, and what percent represent relatively short-term obligations that might fit the definition of cash equivalents?

MR. BOIES: Can I have just one moment, Your Honor?

THE COURT: Sure.

MR. BOIES: Your Honor, our common understanding is that the government securities longer than ninety days are approximately 1.5 billion (ph.) dollars.

THE COURT: That's a fairly wide swath of securities, though. There could be securities that are six-month securities or securities that are, as you point out, sixteen or

nineteen-year securities. It depends on the maturities. I don't suggest that you selected the long-term maturities to be in any way misleading, but I don't know to what extent they're representative.

MR. BOIES: Your Honor, could I have just one more moment?

THE COURT: Absolutely.

MR. BOIES: Your Honor, our best estimate is that 640 million dollars have maturities of more than fifteen years. Now, I understand that it is still a large amount of real estate between fifteen years and ninety days, but as I -- and we can furnish a breakdown of that, and we'd be prepared to furnish a breakdown of that to the Court. But as I stand here now, I can tell you what is longer than ninety days, and I can tell you what's longer than fifteen years. But exactly where the amount is between the ninety days and the fifteen years, we would need to do some calculations. But we can do that and we can furnish it to the Court.

THE COURT: Okay, and I'm not being at all critical here when I make this next point, but why is it that these essentially defensive issues concerning the duration of the government securities that constituted part of the margin never came up during the trial? I never heard this before.

MR. BOIES: Your Honor, during the trial, we read them as saying, as the Court indicated a few moments ago you read

them as saying, that they were objecting to cash and cash equivalents. Now, cash and cash equivalents has a very standard definition. It's not only the definition that's in our annual report, Barclays' annual reports, their annual reports. It is the Financial Accounting Standards Board, the International Accounting Standards Board defined cash equivalents as investments of original maturities of three months or less. And we set this out in some of the citations in chart 12 of what we've given the Court. So when they talked about cash and cash equivalents, from our perspective, that had a very defined meaning, including in the materials that were in the record.

THE COURT: So did you believe during the trial that the only margin that was in dispute was margin that fit the definition of cash and cash equivalents as that term might be understood from standard reference points?

MR. BOIES: We believed that their basic argument was cash and cash equivalents, Your Honor. There was no doubt, okay, that there were discussions of proprietary margin, but I think if the Court goes back and looks at the record, the Court would find references to any issue that the trustee was arguing about other than cash in terms of these marginal -- few and far between. I'm not saying they aren't there, but I'm saying that the primary argument was, as I think everybody's recognized, that there was to be no transfer of cash and cash equivalents,

and there were clearly transfers of cash and cash equivalents.

THE COURT: I recognize that, but from my perspective, and I've been -- I've been presiding in this 60(b) dispute for some time -- I cannot recall a single instance in which Barclays raised during the trial in defense of the claims made by the trustee to recover margin, that that margin should not be turned over on account of the fact that a significant percentage of the amount in dispute was invested in long-term government securities. It just never was presented to me.

MR. BOIES: I think what was presented was the question of cash or cash equivalents. We argued in our post-trial brief that cash equivalents were limited to securities of more than -- or, less than ninety days, less than three months. In our trial presentation, we argued that we were entitled to all of the margin. We thought we were fighting over whether we were entitled to all of the margin, our position, or whether we were only entitled to that margin that was not cash and cash equivalents. And we thought that the term cash and cash equivalents had a standard definition that we reference in our post-trial brief. So I think we tried to be clear on that issue.

THE COURT: I understand. I'm just telling you that I never heard until this briefing round in connection with the form of order to enter that we had an issue concerning longer term maturities of government securities and that the amount at

issue was as much as 1.5 billion dollars. And trust me; if you had brought that up during the trial, I would have remembered it. It didn't come up.

MR. BOIES: I think the Court is correct that there was nothing in the trial that calculated what percentage of the -- or, what amount in dollars of the government securities were longer than ninety days, although that number was obviously in the materials that went into evidence. I don't think we argued that -- I don't think we argued that issue until the post-trial briefs.

THE COURT: Okay, so we're in agreement on that at least. And Mr. Maguire, I think, should have an opportunity to address the government securities component of margin which we've been addressing. You had another issue you wanted to address as well, Mr. Boies.

MR. BOIES: I did, and I can do that and I'll do this in any order that is most helpful to the Court. Would the Court like me to jump to responding to his point, which was -- which didn't have to do with the definition of cash and cash equivalents; it had to do with what we referred to as the offset point.

THE COURT: Sure. Let's do the offset point; then we'll give Mr. Maguire a chance --

MR. BOIES: Okay.

THE COURT: -- to talk about government securities,

and he'll be able to also counter your offset point.

MR. BOIES: Okay. Now, as I understand the trustee's argument in response to -- you can call it offset, Section 550(e), it's all basically the same point, which is that we took certain liability and we took the margin that secured those liabilities, and if you turn to tab 18, you'll see that this issue only arises in the present context, the context we're talking about right now, in connection with the 1.3 billion in margin assets transferred to Barclays as part of LBI's OCC accounts. And these were security for the liabilities, the proprietary and affiliate positions liabilities in those accounts.

Now, the -- going on to the next chart, the amount of any liabilities, of any of these liabilities that Barclays was taking on were secured by the transferred assets which included the margin. And if you say that Barclays is required to take those liabilities without taking the margin that comes with it, what you're obviously doing is you are taking away part of the quo for the quid that was being negotiated. Now, this is an argument that the trustee, in his briefing, doesn't really answer the 550(e) argument, except to say we already had that obligation, that is, you already had the OCC obligation. But the Court will remember, among other things, that at the time that the TAA was executed, the reason it was executed when it was is the OCC was about ready to close those accounts out.

For this -- the evidence was undisputed that if this wasn't executed when it was, those accounts were going to be closed out. The reason it was executed before the deal was closed was because the OCC said in no uncertain terms that unless it was executed, they were going to close those accounts out and Lehman wasn't going to have anything. It was at that point that Barclays stepped up and said that they would sign the TAA which, by its terms, gave them the margin that secured the liabilities as well as the liabilities.

We are not here trying to get margin that was transferred that was in excess of what was needed to secure the assets. And there is a chart in here that has the numbers on it. If you go to chart 32, Your Honor, I think maybe you can see what I'm talking about. At the time of the closing -- at the time of the closing, there was a net liability of 1.1 billion dollars that Barclays assumed if you ignore the margin. That is, if you just look at the net of the long and short positions, there's 1.1 billion dollars at the time of closing. In addition to that, as this indicates and BCI Exhibit 147 at page 2 supports this, after the closing, there was an additional 730 million dollars of losses on the option positions in the LBI proprietary accounts -- the LBI proprietary accounts at OCC that Barclays was assuming.

Now, we're not saying -- I'm now passing all of our other arguments, all right? In this part of our argument, we

are not saying that we get the margin that was in excess of that net liability. That is, to the extent that there was margin -- and there was some margin -- that was in excess of that 1.8 billion dollars, we're not saying we get that under this offset. But what we are saying is that you can't say that we take the OCC accounts, which we didn't have to take -- they were going to be closed out; we didn't have to sign that TAA. We signed the TAA because we were getting not only the liabilities but the margin secured those liabilities. And when you try to break up the TAA and you say, well, you're going to take the liabilities that exist at the closing, but we're not going to give you the margin that was already pledged, secured by those liabilities, we don't think there is any basis in law or in fact or equity to do that.

Let me put it this way. If we have not executed a TAA, if we've not taken over the OCC, we would have been neutral as far as the OCC assets and liabilities are concerned; they would have been neutral. All right? The fact that we took them over before they were closed out means that under the Court's order, they are getting at a minimum the difference between the margin that was required to secure net liabilities that existed and the total margin. What they're arguing for is that this TAA assumption should, on day one, have been something that gave them a 1.1 to 1.8 billion dollar windfall plus amount and gave us on day one a 1.1 to 1.8 billion dollar

shortfall. And their argument is that we said at the trial that we were entitled to all of the long and short positions and including the margin. When he quoted that to Your Honor, he left out the last clause of our statement which talked about including the margin. That was our position.

Our position at trial was that we were entitled to all the assets, all the liabilities, all the margin. If the Court concludes that we're not entitled to all of the margin, we think we must at least be entitled to that amount of the margin that is necessary to keep us from having, on day one, a net liability.

Now, I want -- just one more point, I would ask you to look at tab 9 because this sets out Mr. Kobak's -- 29, tab 29 which sets out Mr. Kobak's testimony. Mr. Kobak was the trustee's 30(b)(6) representative. That is, he spoke for the trustee, the trustee is bound by what he testified to. And we're talking about the OCC margin. And I asked him, referencing this part of the agreement that said LBI has assigned Barclays "all rights and securities, cash and other property defined as collateral pledged by LBI, the Options Clearing Corporation held for OCC's benefit at JPMorgan Chase. Did you see that?"

"A. Yes.

"Q. When you say you signed this consistent with the idea there would be no cash, this says cash. This says cash will be

transferred to Barclays.
"A. Yeah, but cash would be transferred against liabilities.
"Q. So to the extent that cash was simply needed to cover the liabilities, you thought it was possible to be included in the deal, is that correct?
"A. Yes."
This is the trustee's 30(b)(6) representative whose testimony they are bound by, and even he is recognizing that to the extent that the margin, even cash, was necessary in order to satisfy secure liabilities that existed at that time, that we're entitled to it.
THE COURT: Okay.
MR. BOIES: Thank you.
THE COURT: Thank you.
Mr. Maguire?
MR. MAGUIRE: We have two issues to address, Your Honor. In terms of which one you'd like me to address first, is there any preference?
THE COURT: Take your pick.
MR. MAGUIRE: Okay. Well, starting with the last one, the issue of the offset, Mr. Boies started out by saying that the liabilities that that -- Barclays not getting the margin meant they weren't getting the pro for the quid. And that, frankly, is what we tried for thirty-four days, which was was the margin consideration for taking on the exchange-traded

derivatives business. Was the margin in the deal or was it not in the deal. Here, Barclays was acquiring the North American business of Lehman Brothers. It was acquiring an extremely valuable franchise. It wasn't just acquiring derivatives; it was acquiring the entire franchise. It could have done that with the margin if that was the deal. It could have done that without the margin if that was the deal. And the whole issue that we tried for thirty-four days was -- which is was the margin in the deal or wasn't it in the deal. And that issue was squarely resolved by the Court's opinion in February which is that margin was excluded from the deal. And the Court squarely rejected the arguments that Barclays made that no rational purchaser would undertake a deal of this kind without having the margin in hand for the reason that the issue was not what a rational purchaser would or would not do but what, in fact, the parties had agreed to do in this specific circumstance.

Mr. Boies did not respond to the points that I raised earlier, which is that his new offset argument is a 180-degree reversal of the affirmative representations that Barclays made to the Court before and after the trial in which on occasion and reoccasion, Barclays reaffirmed that it took, under the clarification letter, under the asset purchase agreement, not under the transfer and assumption agreement, under the clarification letter, it took responsibility for the short

exchange-traded derivatives positions.

Mr. Boies refers, instead, to the testimony of the trustee's counsel, Mr. Kobak, but as you will recall, Your Honor, Mr. Kobak was present here at the sale hearing. What he heard was that there was no Lehman cash going to Barclays. All of his testimony is based on his understanding at the time which was that there was no proprietary, no Lehman-owned cash, that was going to Barclays. Obviously, there was customer property that was going to Barclays, not the firm's property.

That's really all I have to say, I think, on the offset issue, Your Honor. Unless you have a question, I'm happy to turn to the other issue concerning government securities.

THE COURT: So your position on the offset issue is that you're entitled to approximately 2.1 billion dollars in cash, cash equivalents and government securities without offset.

MR. MAGUIRE: With no offset of any kind.

THE COURT: Yes.

MR. MAGUIRE: That's correct, Your Honor.

THE COURT: Okay, I understand it.

MR. MAGUIRE: And now on the subject of government securities, Barclays is raising this accounting convention that the parties used in their annual reports whereby for purposes of financial statement presentation, government bonds were

classified in different categories, depending on their maturities, obviously, something that we did not at all go to explore in the course of this trial. This trial was not a fight over the duration of government securities or long bonds. This trial was a fight about margin, and it was very clearly about all of the margin. We were not disputing some of the margin; we were disputing all of the margin. And we put on the board and we fought through the thirty-four day hearing the number of four billion dollars.

THE COURT: You make it sound as if the whole trial was about margin; of course, it was about a lot of other things, as well.

MR. MAGUIRE: There were a few mundane matters that managed to sneak in, but from my narrow perspective, Your Honor, you'll understand that --

THE COURT: I understand what you were fighting about.

MR. MAGUIRE: And that four billion dollar number that I believe is reflected in the Court's opinion, of course, includes the one and a half billion of government securities. We did not come into this court asking for two and a half billion dollars in margin, and Barclays did not defend against two and a half billion dollars of margin. We fought the fight over the four billion, and the four billion includes every dollar of those long-term government bonds, whether their maturity is ninety days or ninety years. They're all in the

four billion that we fought about before you.

Mr. Boies suggested that Your Honor's opinion does not lay out as basis to award the margin or to find that those long-term government bonds belong to the estate and to the trustee, and I respectfully disagree with Mr. Boies on that score. There are multiple bases in the Court's opinion. Very specifically, the Court pointed to exclusion N in the Court's opinion -- in the agreement, the parties' agreement, the asset purchase agreement. And Barclays entirely ignored that when they filed their main brief, here, and they obviously saw our brief, and they did respond on reply. And our slide 4 sets forth where Barclays acknowledged on reply in their brief at paragraph 74 the fact that this had been raised and had been addressed. In the first sentence of that paragraph, Barclays states, "The trustee also points to footnote 35 of the Court's opinion in which the Court appears to have adopted the trustee's argument that subsection N of the definition of excluded assets included any assets primarily related to exchange-traded derivatives." It goes on, then, where Barclays respectfully reiterates its assertion.

Now, that, frankly, sounds to us an awful lot like reconsideration and reargument. And in the course of the proceeding that we're here today in terms of the form of the order that should be entered giving effect, it seems that that is not properly posed. And even if this were properly a motion

for reconsideration or for reargument, we respectfully submit that there is absolutely no basis for any such motion because there is no controlling factor, controlling law that Barclays points to that was overlooked by the Court. On the contrary, exclusion N which excludes all assets primarily related to derivative positions, no matter what their maturity is, that was squarely addressed at the trial and that is squarely addressed in the Court's opinion, as, of course, is exclusion B for cash, cash equivalents, and our quibble over what is a cash equivalent I don't believe matters here when you consider all of the other items and exclusions that we have. But I would point out that in addition to excluding cash and cash equivalents, the sentence goes on to cover similar cash items.

So we have exclusion N clearly covers all assets, all the margin assets. We have exclusion B that covers cash, cash equivalents and similar cash items. And then of course, that's without even getting to the specific exclusion for government securities which is not only before the Court, in the parties' agreement and specifically addressed in the Court's opinion.

So respectfully, we disagree with Mr. Boies and believe that the Court's opinion does, indeed, lay out a basis for the trustee to be entitled and to recover the one and a half billion dollars of long-dated government bonds.

Mr. Boies has suggested that there is an exception to the exclusion for government securities in 1(b) because it says

"except to the extent otherwise provided". But he stopped there and he didn't say where it might otherwise be provided. But I have a suspicion that he might be thinking about Mr. Rosen's famous parenthetical, which, of course, has been litigated, was the subject of the trial, is clearly the subject of the Court's opinion, which the Court interpreted that to mean customer property and could not possibly be a basis for Barclays to carve out any Lehman proprietary government securities.

That's all I have, Your Honor, unless you have any questions.

THE COURT: Anything more, Mr. Boies, on this point?

MR. BOIES: No, Your Honor, not on those points. I have one more point that's -- it's a much smaller point. I have one more point.

THE COURT: Does it relate to the subject of margin?

MR. BOIES: Yes.

THE COURT: Okay, I'd like to hear it then.

MR. BOIES: And this has to do with what are called clearing funds, and this is an issue that does relate to millions and not billions, but it relates to a substantial number of millions, about 171 million dollars, at least.

First -- and these are tabs 13 through 18 -- clearing funds are deposits that clearing corporations require their clearing members to deposit to secure the obligations of the

clearing members. Now, these are -- this is not margin in the sense that we've been talking about up until now. And if you look at tab 14, the clearing funds are a long-term requirement. They do not fluctuate on a daily basis in the way that margin requirements do.

Second, they are used to secure obligations relating to both customer and proprietary trading without distinguishing between the two so that when they put up clearing funds, it's not limited to proprietary, it's not limited to customer. It permits both to go forward.

Third, the clearing funds from LBI were pooled with those from other clearing brokers, and the clearing corporation had the ability to draw from that pool when any clearing member defaulted. That is, this is money that is put up by LBI, it's given to a clearing corporation like OCC -- let me take OCC as the example because LBI had 171 million dollars of deposited clearing funds at OCC. Those clearing funds were available for OCC to use for customer accounts, proprietary accounts, or for defaults from companies other than LBI.

Now, the Court did not mention clearing funds in its opinion, but in the margin numbers that we're talking about, these clearing funds are included. That is, the margin that they are seeking to recover includes these clearing funds. And if you go to chart 17, what the Court held at page 89 of the Court's opinion was that "various regulations and rules require

customers to deposit collateral with a broker-dealer, or in the case of futures, their futures commission merchant to support trading of futures and options contracts. This collateral which is deposited by customers with a broker-dealer or future commission merchant and held for the benefit of customers constitutes the property that may be held to secure obligations under exchange-traded derivatives."

Now, these funds that are deposited are deposited to help secure the obligations under the exchange derivative contracts of both proprietary and customer. And because of that nature, we think that those do not fall within the margin the way the Court was defining it in the Court's opinion.

The only thing, it occurs to me that I should be clear about -- with the Court, I think I said this before, but I want to be sure I did. The idea that -- the argument that we're making with respect to margin, either with respect to cash and cash equivalents or with respect to the -- what constitutes margin or what our obligations were in the absence of a TAA is not a new argument. This was in our post-findings of fact, conclusions of law that we submitted to court before -- long before these briefings issues. I think I made that clear, but I want to -- I didn't want the Court to be under any misapprehension because counsel sort of implied that again in what he just said. Where we have said that we have been entitled to all of the margin and all of the liabilities and

all of the short positions related to where we were saying that was our position. And that has been our position from the beginning.

Our position now is no different. We think we are entitled to that, but the Court held otherwise. So what we're saying is that with respect to that Court holding, if you're going to hold otherwise and you're going to hold that we're not entitled to the margin, then we ought to at least be able to keep the margin that offsets the liabilities that existed at the OCC which we didn't have to take. We didn't have to sign that TAA. We could have just let the OCC close out their accounts, which is what the OCC was going to do.

THE COURT: Mr. Boies, this last point you're making hearkens back to an earlier point you made. I take it it's different from the clearing funds argument --

MR. BOIES: Yes.

THE COURT: -- that you had just made?

MR. BOIES: Yes, Your Honor, you're right, Your Honor. And I just -- it was different. And it just occurred to me that I wanted to be really sure that I'd been clear with the Court about that point. I think I mentioned that point before, but I wanted to be really clear that the distinction between saying we're entitled to all of the margin, all of the longs, all of the shorts, which was our original position continues to be our position. And what we're doing now, which is accepting

that the Court's ruled against us on that, and saying if we're not entitled to all of this, we should be at least entitled to the margin that is required to offset at least the OCC liabilities -- if you forget everything else -- at least the OCC liabilities that we signed an agreement that was designed, as everybody knew and said at the time and told Your Honor at trial, was designed to prevent and was necessary to prevent the OCC from simply closing out all those accounts.

THE COURT: Okay.

MR. BOIES: Thank you, Your Honor.

THE COURT: I think I should give Mr. Maguire an opportunity to comment about this clearing funds argument, which frankly is a new argument to me.

MR. MAGUIRE: Yes, it is new, Your Honor. We would agree with that; it's new to us as well. We do agree with Mr. Boies that it is -- this entire amount in the clearing funds -- is included in the two billion of margin that we've been talking about, and we do agree that these clearing funds were funds that were kept to secure exchange-traded derivatives positions, both firm-proprietary and to customer. But all of this clearing funds is Lehman proprietary government securities. It's all Lehman property and it was all at (ph.) the exchanges for the purpose of securing as margin for the Lehman and the customer securities. None of it is customer property.

THE COURT: So is it the trustee's position that there is no appropriate distinction to be made with respect to the term "clearing funds" and that clearing funds are properly included in the general category of margin and that all of these funds should be turned over to the trustee?

MR. MAGUIRE: That is exactly our position, Your Honor. It falls squarely within the margin assets that are the subject of exclusion N, squarely within the cash, cash equivalents, similar cash items of exclusion B and squarely within the clarifications letter, exclusion of government securities.

THE COURT: Okay. I think I've probably heard a sufficient amount of argument on the subject of margin and I'm inclined to take a ten-minute break before going into the next phase of our arguments so that we can all stretch our legs and refresh ourselves a little bit. So let's take a ten-minute break, and I'll see you at twenty-five of the hour.

(Recess from 3:27 p.m. until 3:43 p.m.)

THE COURT: Let's move on to the next matter in dispute.

MR. MAGUIRE: If it please the Court, Bill Maguire for the trustee.

Your Honor, our next issue is the question of the trustee's claim for pre-judgment interest on the amounts due to the trustee under the Court's ruling. Now, we believe,

respectfully, that that's well within the Court's power to award the trustee interest and to award the trustee interest at the New York statutory rate of nine percent on the margin assets. We believe that is well within the discretion of the Court under Count II and Count III of our claims because they are claims for declaratory relief that arise under state law.

We also have a claim for conversion. And the reason I raise this is because we submit that for a claim of conversion under New York State law, the awarding of interest at the statutory rate is mandatory. Now, the conversion claim was one of those claims in our adversary proceeding that was deferred and was not one of the claims that was live in the course of the thirty-four day trial. However, the Court's ruling in February, we submit, deals with the issue of the rights to the margin and, we believe, substantively disposes of the merits of that claim. And we don't think it's necessary for us to do a redo just for the purpose of establishing our right to interest.

Barclays makes an argument that in conversion, the right to pre-judgment interest at the New York rate only arises when -- from the time that a demand has been made, so they seek to cut off the interest, about a year's worth of the interest. In fact, we disagree with Barclays' statement of the law because the entire demand requirement is excused in certain circumstances where the person in possession of the property

already knows that their possession is unlawful. The whole purpose of the demand requirement is to put the innocent possessor on notice that there's a problem with their possession and then to give them a chance to cure it by giving up possession.

Now, here, we respectfully submit Barclays was on notice from the very beginning that it was not supposed to be getting any of Lehman's cash. It heard that at the sale hearing, it was part of the asset purchase agreement, that's the whole issue that we've heard throughout these proceedings is that affirmative representations were made to this Court at the sale hearing in which Barclays participated, that there was no Lehman cash going to Barclays. And on this specific issue, there's no nuance, there's no room, really, for any question of definition about the word "cash". Here, we're talking now, the sums that Barclays is supposed to be paying us on our pre-judgment interest is in large part cash. At tab 5 of our binder, we show you there, Your Honor, that the parties stipulated that the cash we're talking about, the 1.3 billion dollars in cash assets that Barclays got immediately on the closing of this deal, was all cash. It was not government securities. The trustee has the government securities; what Barclays got was the very cash that the Court was told Barclays was not supposed to be getting. And you may recall, in the course of the trial, there were a number of e-mail exchanges

back and forth in which Barclays' counsel corresponded directly with the Options Clearing Corporation to determine and confirm that indeed, this was cash.

THE COURT: Mr. Maguire, is your request for pre-judgment interest at the nine percent rate limited to the 1.3 billion dollars in cash assets or is it a request that extends to the approximately 2.1 billion dollars in margin?

MR. MAGUIRE: It's everything, Your Honor; 1.3 is part of it because that's pure cash, and if you turn to the next tab, Your Honor, you'll see that the second piece of our claim that gets us to the balance of the 2-whatever billion dollars is money market funds. This was money that -- proprietary Lehman money that it maintained in an account. It was referred to sometimes as the buffer or the excess in the account that was supporting customer derivatives trading. And that was in the form of money market funds. And I don't believe there's ever been any question from Barclays -- before, during, after, even in the course of our mutual briefing these issues before the Court, there's never been any suggestion that money market funds are anything other than cash or cash equivalents. So the some-several hundred million dollars in money market funds which, when aggregated with the 1.3 billion, comes to the totality of the 2-whatever billion dollars that is the entirety of the margin assets that Barclays has that is due to the trustee. And I think the only piece, maybe, that is not pure

cash of all of that would be the clearing funds. So to the extent that Barclays has any of those in the form of security, then I guess they would be government securities.

THE COURT: Is it -- just to say what I guess is obvious from what you've said, as to the 2.1 -- more or less -- billion dollars that the parties stipulate represents the calculation of margin to be turned over by Barclays to the trustee, that entire amount, except, perhaps, for the clearing funds that you just referenced, constitutes cash or cash equivalents in an amount that the trustee would assert Barclays knew it didn't have a right to hold from at least the date of the sale hearing, as a result of which you assert that you should be entitled to nine percent pre-judgment interest running from September 22, 2008, is that correct?

MR. MAGUIRE: That is exactly correct, and the only thing that I'm slightly uncertain about, Your Honor, is exactly where the clearing funds fit into the picture. I just, offhand, don't remember exactly if that's in the possession of Barclays and part of the two billion are not. I believe it is, but I need to confirm that for you.

THE COURT: Okay. Now, I understand the amount, I understand the reason for the reference date for calculation. What's the reason for the rate to be calculated at nine percent, as opposed to the federal judgment rate?

MR. MAGUIRE: The reason, Your Honor, is simply that

New York law requires that, that this is something that arises out of a state claim and under New York law applying our conversion claim.

THE COURT: Even though the 90(b) (sic) trial did not definitionally directly relate to that claim --

MR. MAGUIRE: That's --

THE COURT: -- it indirectly related to that claim.

MR. MAGUIRE: That's absolutely right. We deferred -- we agreed to defer for later cleanup the conversion claim on the understanding -- educated understanding at the time -- that it likely would be resolved, in substance, by the Court's ruling. And in fact, we submit that it has been resolved, that there's really nothing left to fight about on a conversion claim, given the Court's ruling on the margin assets, so the only thing that's left is the question of pre-judgment interest. But where a party comes into court on a state claim of conversion and prevails, then the party is entitled, as a mandatory matter, to the nine percent.

THE COURT: Okay. Mr. Boies?

MR. BOIES: Thank you, Your Honor. Our tabs 34 through 39 address this issue. I mean, essentially, the background is that two days before the April 28th briefs were filed, the trustee informed Barclays for the very first time that the trustee was claiming pre-judgment interest at a rate of nine percent on any margin assets Barclays was ordered to

return.

The trustee agrees that this relates to a state law issue. We think that even under New York State law they would not be entitled to pre-judgment interest, but we think certainly under federal law in the bankruptcy court they're not entitled to this interest and they're not entitled to interest at nine percent if they're entitled to any interest at all. They say that they have a conversion claim and they agree that the conversion claim was not litigated, but they assert that that was just a formality because the underlying issues for the conversion claim were litigated.

That simply is not so, Your Honor. I remind the Court that this amount of money was transferred by them to Barclays. Barclays didn't go take it. Barclays didn't embezzle it. Barclays didn't steal it. Barclays did not get it in any improper way. None of the requirements for a conversion under state law are made out. The Lehman personnel responsible for this paid it over. And the reason that they paid it over, Your Honor, was because they'd signed documents that said they owed us the cash. They had sent e-mails saying they owed us the cash. The OCC had sent them e-mails saying if you don't say anything we're going to assume that this cash belongs to Barclays and we're going to send it to them. And they sent back e-mails that said okay.

This was a situation in which everybody worked on the

assumption -- and I'm not rearguing the merits because I know what the Court has held, I'm simply saying that if you're talking about state of mind and whether Barclays took this improperly you've got to keep in mind that at the time it was done everybody thought that Barclays was entitled to this. That's what Weil Gotshal thought. That's what Lehman thought. That's what LBHI thought. All of these people knew what was going on. All of these people authorized it. So for them to come in and say that somehow Barclays converted illegally these funds because the Court has held that there was not a meeting of the minds on the clarification letter and all of the alternative grounds that the Court has, the fact is that whether or not we are as a matter of contract entitled to it or not, I don't think you can argue that there is any basis for finding that Barclays somehow converted these funds.

Mr. Kobak, the 30(b)(6) witness, testifies that it was his understanding at the time that we got the funds for the OCC that were necessary to balance the liabilities -- the net liabilities that we were taking on and it was not just the thought that it was just cash. He didn't limit it to cash. He didn't limit it to noncash. He didn't limit it to customer accounts. He didn't limit it to proprietary accounts. The Court's seen that testimony. That was the trustee's testimony at the time.

Now, it may be that they were all wrong, and that

issue goes to the issues that we argued about before at the trial and that to some extent we argued about in the earlier phase of this hearing. But when you come to pre-judgment interest I don't think there can be any argument that this was all something that people voluntarily transferred at the time because that was their interpretation at the time, right or wrong, but that was their interpretation at the time as to what was required.

Thank you, Your Honor.

THE COURT: Okay.

MR. MAGUIRE: Your Honor, first as to the point that we did not fully and clearly set forth that we were seeking interest, I would just point out that our adversary complaint Count XII is a claim for conversion and it states -- provides in paragraph 147, "The trustee is entitled to judgment in an amount not less than 2.9 billion dollars together with interests, cost and such other and different relief as the Court may find just and proper." So I do believe the claim for interest was set forth. I don't believe it's necessary that a claim for interest be set forth, but that's neither here nor there; it was set forth.

And also, the parties, in deferring that claim, entered into a stipulation and order before the Court that was dated January 13 of 2010. And in paragraph 4 of that stipulation and order it is provided that "the stay of claims

referenced in paragraph 3 above" -- and that's -- includes the conversion claim -- "is without prejudice to any party's ability to seek resolution of those claims through motions informed by or based on the Court's prior resolution of the Rule 60(b) motions." So I believe the claim for interest was made, it was preserved and is entirely proper.

I think I am in a position to clear up a little bit of the question of the clearing funds composition here. My understanding is that with the exception of nineteen million dollars we actually have all of the clearing funds. So there's no pre-judgment interest claim with respect to the clearing funds.

THE COURT: Okay. You haven't responded yet to Mr. Boies' contention that you really never put on a case for, nor could you have put on a case for conversion under New York law because the funds were simply turned over to Barclays at the closing.

MR. MAGUIRE: Yeah, Barclays took over the accounts in which the cash existed; there's no question about that. This was not a case of somebody coming in and stealing the cash off a suitcase and running out the door. This was done through a commercial transaction in which the OCC accounts were transferred.

At the time, of course, the trustee and the trustee's counsel, as you've heard, had been informed at the sale hearing

that there was no Lehman proprietary cash. There was no cash. And there was no cash specifically going to Barclays. Barclays knew better. Barclays' counsel was the person who was directly communicating with the OCC over the Friday and the weekend and who specifically clarified that indeed there was cash. Everybody was wrong; there actually was cash, and specifically that it was proprietary cash.

And of course, Barclays got that cash. And Barclays got that cash having fully participated in the sale hearing in which the representations were made to the Court that Barclays was not getting any cash. So in those circumstances to say that the innocent party should have to find out exactly what is happening and is not entitled to rely on the representations that were made at the sale hearing but must undertake an investigation and go ask the OCC for statements that are now going to Barclays, as the account holder, to figure out that my goodness, there actually is cash here and then send a demand to Barclays saying we want the cash back, we think that's exactly the kind of circumstance where demand is excused because the party who is exercising unlawful possession is the party with superior knowledge. It's the one party who has a derivatives expert, a lawyer on the scene at the time who is directly communicating with the transferring party, the OCC, and who knows right from the beginning, long before any demand has been made, long before the trustee is in a position to even consider

making a demand, that there's billions of dollars of cash being moved despite the representations that were made to the Court.

THE COURT: Okay. Okay, meaning I've heard the argument.

Do you have anything more on this, Mr. Boies?

MR. BOIES: No, Your Honor, I don't think so. I think the Court has in mind the record evidence on this. I think that what counsel says just doesn't reflect the many, many things that are in the record, testimony and documents in which people knew what was happening, knew cash was being transferred. Mr. Kobak's testimony, after the closing the trustee transferred additional cash. So I just don't think it reflects what's in the record.

THE COURT: Okay. I've heard enough on this and I'm going to give it some thought. My immediate reaction, though, is that I don't feel as if I presided over a trial for conversion. I feel as if I presided over a trial that related to the asset purchase agreement, the clarification agreement and other ancillary agreements. And that's, in part, because the very count that we're talking about, the conversion count, was reserved for the future. But let me give it some thought. I'm going to reserve on this one.

What's the next point that we need to discuss?

MR. MAGUIRE: If it please the Court, Bill Maguire for the SIPA Trustee.

One additional point that we raised, Your Honor, is that we believe on page 9 of the Court's opinion there is a statement, we respectfully submit, and a statement that is inadvertently inconsistent with the thrust of the Court's opinion, and that is a statement, unimportant in and of itself, that ascribes to the Friday asset scramble all three of the disputed assets, including specifically the margin.

THE COURT: Let me stop you on this because I have paid some special attention to this point that is in dispute between the parties and I've actually reviewed some of the underlying materials as well as my own thinking as I was drafting the opinion. And it wasn't inadvertent.

We believe -- and that's my clerks and myself -- as we were addressing the issues that were before the Court, that regardless of whatever was in a stipulated fact, that the evidence is consistent with there being attention paid on Friday, September 19, to the three classes of disputed assets, including margin. It doesn't matter whether there was or was not any understanding reached on Friday morning to include margin. Without question, I think, Paolo Tonucci's testimony is consistent with some attention having been paid to that category of asset.

For that reason I viewed it as part of the asset scramble. It may not have resulted in an agreement to include it, but it was clearly an asset that the parties paid attention

to after the APA had been drafted, and it became part of the subject matter of the clarification letter. I think there's no dispute as to that. So I don't consider the reference inadvertent.

MR. MAGUIRE: Well, I would accept all of that, Your Honor. The only reason we had any concern about this is because we raised it with Barclays and we were concerned that there not be an issue for any reviewing court where a reviewing court was being told that there was a factual finding not as to this being a matter that was looked at in the asset scramble or as to which attention was being paid but that there was actually an agreement, that there was actually an understanding and that margin was indeed added on the Friday. And in that case, if that kind of argument were to be made before a reviewing court, if that characterization got lost or put on the Court's statement then we had the concern -- certainly I had the concern that a reviewing court might be put in the position of saying here's a factual finding that is at odds with the Court's ruling that the margin assets were excluded. But as Your Honor has described it we have no issue with the Court's statement --

THE COURT: --

MR. MAGUIRE: -- on page 9 of its opinion.

One remaining issue, I believe, Your Honor, concerns the form of order on Rule 15c3-3. And I don't believe, despite

what you may have heard the last time, there really is any substantive dispute between the parties on this.

We did litigate and we fought hard about the issue of whether Barclays had an unconditional right to the 769 million. That is resolved by the Court's ruling.

We did not litigate whether Barclays has a conditional right to the 769 million once the trustee is in a position to pay all customers their property. We have never disputed that. We have always agreed that we will pay Barclays the 769 million when and to the extent we are able to, after taking account what we need for customer property. So there's no dispute there.

The reason why this is still a live issue is two things in Barclays' form of order. One, Barclays wants us to regularly do a 15c3-3 computation every week. That of course is a completely pointless exercise and Barclays has no contractual or other right to make us do that kind of thing. We do report regularly to the Court, and if we're in a position to be able to restore customers their property then it is very likely we will be before Your Honor in connection with that. So Barclays has whatever information it needs to apprise itself of the ongoing status of the estate without any need for such reporting which it has no right to and which is entirely wasteful and unnecessary.

And secondly, we don't believe it's appropriate for

the trustee to be ordered to do something which the trustee has agreed to do. We're perfectly happy to confirm again in writing to Barclays that we're willing to do that. We already have. It's clear from Your Honor's order that we have to do it. So there's no dispute.

We're happy to put it in the order in a whereas clause so that it's absolutely clear for all to see that that's what's going to happen. The only objection is to putting it in a decretal paragraph in which there is something that we have to do in the future.

And the concern -- the reason I raise that concern is simply I do not want to have to address any issue by any reviewing court as to whether there is subject matter jurisdiction, depending on whether this is a ministerial act or is not a ministerial act and whether putting this in the decretal section of the Court's final order destroys finality. It seems to me Barclays is fully protected (ph.). There is no -- we have not said -- we are not in breach and we have not said we will breach. There is no anticipatory breach. On the contrary, we have said we will fully honor that commitment. And as I say, we're happy to reaffirm it in a written agreement. We're happy to stipulate. We're happy to have it go in a whereas clause. We just don't think this should be anything that's in a decretal section of the Court's order and not something that the parties should have to deal with in

terms of raising a finality issue that's entirely unnecessary.

THE COURT: Mr. Boies, do you have any reaction to that?

MR. BOIES: Your Honor, I mean, we argued we're entitled to the 769. They argued we weren't entitled to the 769. What the Court held is that we were conditionally entitled to the 769, that we were entitled to as much of the 769 as could be paid when and if the trustee determined that there were sufficient assets to repay all LBI customers. All that we're asking is that that be put into the order. That doesn't destroy any subject matter jurisdiction. That simply reflects what the Court has found.

THE COURT: Well, you were looking, if I remember correctly, for active reporting.

MR. BOIES: Yes, Your Honor, and --

THE COURT: Is that still part of your proposed order?

MR. BOIES: Your Honor, I'll withdraw the active reporting. As long as the trustee will say, as he did to the Court, that he's going to report on this periodically to the Court, it doesn't have to be weekly. And if he gives us a copy of it when he reports to the Court, that's fine. We're not interested in making him do additional work.

THE COURT: Does that work for you, Mr. Maguire?

MR. MAGUIRE: What I was referring to, Your Honor, are our regular reports that we make on the state of the estate to

the Court as well as applications that we make from time to time whenever we're in a position to bring something before you concerning customer property. So that I would understand would be entirely satisfactory --

MR. BOIES: Yes, I --

MR. MAGUIRE: -- and certainly we will continue to do that, and within a nanosecond of us filing any such report I have no doubt my colleagues will have it but we will make sure that they have it.

MR. BOIES: Okay. And I accept that. I am confident he will -- as he says, when they reach that point they'll tell the Court and if they tell us, that'll be fine.

THE COURT: All right. That seems like an agreement.

And to the extent that it's useful to note this, I don't believe that including within the order, anywhere within the order, the notion that the rights under 15c3-3 are conditional and will be dependent upon future events, not yet foreseeable, has any impact upon the finality of the determination. I believe it is a final determination fully consistent with that section of the opinion that dealt with that subject matter.

MR. BOIES: And we agree with that, Your Honor.

THE COURT: In that case, the finality question should be resolved for any reviewing court.

Now, is there more?

MR. BOIES: I don't think so, Your Honor, but can I have just a moment to consult with counsel?

THE COURT: Sure.

MR. BOIES: Your Honor, we are in agreement.

THE COURT: Good. I think what I'm going to propose is that I want to give some further thought to the two principal subjects that have been argued this afternoon and spend a little bit more time reviewing the demonstrative materials that have been proposed. It seems to me that it shouldn't take very long for me to resolve this and I have fairly clear and I think transparent observations that I've made as to how I see these things and some of the concerns I have.

I particularly want to focus some attention on the pre-judgment interest question, which I'll be candid to observe, is one that before the hearing I was prepared to rule on in connection with the settlement at 1.1 billion dollars of the clearance box asset question. And it's one of the reasons that I raised with counsel in the context of that presentation early in the hearing the question of whether the use of nine percent for purposes of deriving the 1.1 billion dollar number might be construed as a balanced agreement in which nine percent would be applicable on both sides. I quickly learned that that was not true. But I think it's also true that if I had been asked to rule on the question of the entitlement of

Barclays to obtain nine percent interest with respect to the calculation of what was due and owing in connection with the clearance box that I doubt that I would have found that nine percent was a fair and appropriate interest rate. But that's simply my now expressed subjective intent. I'm simply letting you know that you made an appropriate agreement and I'm pleased not to have to deal with it further.

But I want to give some further thought to what to do with the rate as to the trustee's claim. My suggestion is that we not set a date yet for a follow-up conference or hearing until I have concluded my deliberations, which shouldn't take terribly long, and we will advise counsel and attempt to schedule an appropriate date for a follow-up. Does that work for everybody?

MR. BOIES: Yes, Your Honor.

THE COURT: Okay. I'll see you next time then.

Oh, I forgot your letter.

MR. GAFFEY: My letter, Your Honor.

THE COURT: Your letter.

MR. GAFFEY: Hence I rise.

THE COURT: And you're standing up and your red tie helped to remind me of the letter that you sent me a week or two ago.

MR. GAFFEY: I knew the red tie was a good idea, Your Honor.

THE COURT: It was a good idea.

MR. GAFFEY: Robert Gaffey for the debtor, Your Honor. We wrote to the Court on the 29th of April asking that in accordance with this Court's rules that this conference also be treated as a pre-motion conference with respect to a summary judgment motion that the debtor would like to make.

Your Honor will recall we had four claims extant as a result of the stipulation that Mr. Maguire talked about a few moments ago, and under paragraph 4 of that stipulation those claims could be resolved as informed by the 60(b) proceedings.

With respect to three of them I have a stipulation proposed to Barclays. That's with respect to the debtors' claims for unjust enrichment, conversion and aiding and abetting breach of fiduciary duty where we would agree to have those claims dismissed. We're not quite done; there's one language issue which I think I just took care of before, but we ought to shortly have a stipulation on that.

That leaves our claim for breach of contract, as it relates solely to Barclays' obligation under the asset purchase agreement with regard to the bonus aspect of the consideration it was required to pay. Put quite briefly, and as we said in our letter, I think there's a basis for us to move based on factual findings that the Court made and discussed in the February opinion. We think that they can be put forward as undisputed or undisputable facts based on the doctrine of

collateral estoppel, and I think the motion would be soundly based. We'd like to proceed with it on a schedule to be set or agreed.

THE COURT: Okay. If this is a pre-motion conference, is there any objection to giving LBHI the opportunity to file its motion for a summary judgment?

MR. BOIES: Your Honor, I don't think so. I think they've got a right to file it. We think that it is not well taken but the fact that we think it's not well taken I don't think can deprive them of the right to file it.

THE COURT: Well, this is just the gatekeeping function that we occasionally get a chance to exercise as to whether or not a motion is ripe for filing and briefing, and it seems to me there's no dispute that it is ripe. It's clearly going to be disputed, based upon Mr. Boies' general observations, and we'll see what happens next.

MR. GAFFEY: And we could work out a briefing schedule once we've gone ahead.

THE COURT: I think that's a good idea.

MR. GAFFEY: Thank you, Your Honor.

THE COURT: And my only suggestion is that before everybody leave, I'm going to -- we're going to adjourn the hearing and I'm going to go off and talk to my courtroom deputy and see if I can identify some possible dates for a follow-up just so you can know what those dates are in advance. I'm not

saying that we're going to have a hearing but I'd like to maybe clear everybody's calendar. I know that everybody's quite busy. So one of my law clerks will come out and at least surface those dates with you on an informal basis.

MR. BOIES: Thank you, Your Honor.

THE COURT: Okay. We're adjourned.

(Whereupon these proceedings were concluded at 4:20 PM)

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dena Page

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